



CONTRACTORS IN THE WORKPLACE

I. INTRODUCTION:

A. Contractors are an integral part of the Army's work force. Many Army requirements (including BASOPS services) could not be performed without contractor support. This guide is provided to assist in working with contractors within the Army workplace environment. In many cases, contractor personnel must interact on a daily basis and exchange knowledge with government employees to perform their tasks effectively. While there are work place differences between government and contractor personnel, government employees should not view contractor personnel in an "us versus them" relationship. Both contractors and government employees are working towards the same goal, to support the Army soldier.

B. There are differences in rules and regulations for contractor and government employees, just as there are distinctions between uniformed service members and government employees. Recognition of these distinctions, coupled with mutual respect and professionalism, may be the difference between success and failure.

II. BUILDING A TOTAL ARMY TEAM

A. Every year, most organizations host holiday parties and picnics. Some feel it necessary to invite contractors to these non-official organizational events and pay them to go. To do otherwise would be to treat them differently and thereby harm the "team" spirit. This approach to treating all equally is inappropriate and results in the unsupported expenditure of tax dollars. The contract defines the duties of the contractor and the money to which he is entitled as a result of performing those duties. While an annual picnic and holiday party is authorized for government employees, no contract authorizes contractor employees to attend such functions at government expense.

B. Government employees have defined entitlements and duties that do not match those of contractor employees. Matters such as pay, leave, retirement, hiring, firing, promotion, education, training all differ between government and contractor employees and differ between different contractors. Rules that apply to government employees such as our ethics rules do not apply to contractor employees. Both sets of employees must look to different sets of laws to determine rights and obligations. We must remember this in our efforts to maximize efficiency and performance success.

C. Contractor personnel attendance at government courses can help a company better understand the government organization or some aspects of a specific task within the scope of work. Generally, if a specific knowledge or skill is required, it should be identified in either the scope of work or under the personnel qualifications section of the contract. Companies are responsible for the individual development, including training, of their employees. However, there may be situations where it is in the best interests of

the government to have a contractor employee receive training that is directly related to the scope of work being performed. It is important to keep in mind that meeting minimum contract personnel qualification requirements is a contractor responsibility. Government funded training of contractor employees would normally be limited to meeting requirements of changes effected during contract administration. Government funding of training necessary to meet contract qualification requirements would not be appropriate. This relieves the contractor of his responsibility to assure his personnel are properly trained and transfers to the government the cost of such training. It is an example of the government assuming management responsibilities properly assigned to the contractor.

D. Most government schools will allow contractor employees to attend their courses, but will require payment for the training. The requiring activity must determine the validity of the training requirement and advise the contracting officer which costs, if any, the activity is willing to directly pay or reimburse the contractor.

E. Although contractors and government employees are working toward a common goal, there are some key distinctions that need to be made. The following information will help both supervisors and government employees understand their distinctive role versus that of the contract employee in the workplace.

1. Contractors must be clearly identified within the workplace to ensure that those interacting with a contractor employee are aware that they are not interacting with a government employee. Therefore, contractors must have a distinctive badge, nametag or other signal as to their special status within the workplace. Contractors that have access to government email and other on-line systems must have user IDs that call attention to their special status (by indicating KTR, or the company name, for example, after their given name in the user ID on the system). In addition, contractors should identify themselves as a contractor employee when answering the phone and their voicemail should likewise indicate their special status. All these safeguards are necessary to avoid potential conflicts of interest and other problems caused by inadvertent disclosure of proprietary or other sensitive information to non-government personnel.

2. The contractor performs work based on the statement of work for which they have a written contract. It is very important that the statement of work be as clear and precise, as possible, in terms of what deliverable products are desired. It is important that government employees understand that there is a specific legal chain of authority through which instructions, clarifications and changes to contractor performance are authorized.

3. The general rule is that the government contracts only for "nonpersonal" services and it is a violation of statutes and civil service regulations when the contracting process is used to "hire" an employee/s. Only the contractor can manage or supervise their employees. Government supervisors and managers **CANNOT:**

- a. Supervise contractor employees.
- b. Stipulate contractor duty hours (except for that directed in the contract).
- c. Require contractor employees to report to government personnel.
- d. Maintain contractor personnel records/time cards.
- e. Approve leave for contractor personnel.
- f. Approve bonuses for contractor personnel.
- g. Develop duty rosters including names of contractors.

F. Contracting authority as defined by law has a direct chain of command from the contracting officer to the appointing authority. That authority comes from the Principal Assistant Responsible for Contracting (PARC) located at the responsible Army Contracting Agency (ACA) regional headquarters. The contracting officer receives technical guidance and supervision from the installation Director of Contracting (DOC) or chief of a contracting activity. However, actual direct acquisition authority comes from the PARC in the form of a written "warrant" designating the individual as a Contracting Officer and the limits of his or her authority to expend federal funds. These Contracting Officers are generally located on or near army installations with a mission to support all assigned army requirements as well as tenant customers as appropriate. As you can see, this command chain does not follow the normal line of authority found within a military organization. It is noted that *no other government employee, whether military or civilian may expend federal funds* with commercial entities with the limited exception of Government Purchase Cardholders acting within their authority. Even the installation commander does not have contract obligation authority and must rely on the contracting officer to act in the government's best interests.

G. As discussed above, authority to commit federal dollars to commercial establishments is granted only to "warranted" procurement officials, designated as contracting officers and purchase cardholders. Management officials often mistake their "technical or functional authority" for "obligation of federal funding" authority. The authority to obligate funds to a commercial entity is vested only in a contracting officer or in the case of micropurchases, the purchase cardholder. In the event someone other than the contracting officer or a purchase cardholder obligates the government, an unauthorized commitment is created. Unauthorized commitments often result when government managers or other government personnel task a contractor to perform work or change the terms of a contract without benefit of a Contracting Officer decision. Although this type of error occurs with all types of contracts, contractors in the workplace are especially vulnerable to this type of direction.

III. AUTHORITY LIMITATIONS

A. Contracting Officers are the only persons authorized to bind the U.S. Government. Therefore, unless the contracting officer has expressly granted written approval to the contracting officer's representative (COR), they are **NOT** authorized to:

1. Clarify, make, or infer legal interpretations on the scope or intent of the contract for the contractor.
2. Approve the contractor's procedures that change/differ from contract specifications.
3. Direct or request any task not specifically provided/required in the contract.
4. Enter into agreements that are not already authorized by the contract.
5. Issue directives to the contractor that alter or exceed contract terms or conditions.
6. Offer advice or recommendations to the contractor, which could directly or indirectly affect a pending contracting officer decision as to fault or negligence.

The above restrictions **always** apply to directors and other government staff. In addition, those who are not a contracting officer or a contracting officer's representative may not approve expenditures of funds.

IV. LIABILITY

CORs, directors or other Government staff should be aware that the parties involved, not the U.S. Government, may assume a liability, which results from an unauthorized act. ***You or your employees may be held personally liable and have to pay out of pocket any cost of an unauthorized commitment, even if the Government benefits.***

V. RATIFICATION

A. Ratifications are approvals, after the fact, of unauthorized commitments. The Commander of the individual whose action resulted in the need for the ratification must endorse the ratification action in accordance with AFARS 5101.602-3-90. The endorsement must be forwarded to the Chief of the Contracting Office., who is the approval authority for ratification actions valued at \$10,000 or less. For ratification actions in excess of \$10,000, but not exceeding \$100,000, the Chief of the Contracting Office will forward the request to the PARC for approval. For ratification actions exceeding \$100,000, the Chief of the Contracting Office will forward the action through

the PARC to the Head of Contracting Activity (HCA) for approval. The ACA HCA is the Director, ACA.

B. In some cases, approval to ratify an action will **NOT** be given. Disciplinary action may result that could affect the employee's personnel status and/or they may be held personally responsible for payment to the contractor or to the government for all costs of the unauthorized commitment. Senior leaders can largely avoid the issue of ratification by ensuring that staff members understand and respect the difference between procurement authority and chain of command.

VI. INFORMATION SECURITY

A. Government employees have access to information that may be extremely valuable to contractors. Although Army employees are familiar with protecting information of military value and understand Privacy Act concerns about releasing information about individuals, the day-to-day For Official Use Only (FOUO) information, which may be available to contractors in the workplace, is not always readily apparent. Use the nondisclosure agreement at Appendix A when contractors may have access to such information

B. A government employee has a responsibility to ensure that government contracts are awarded fairly and impartially. Part of this responsibility is to ensure that one contractor does not have an unfair advantage over another. A contractor to improve their bids and proposals for government contracts can use budget projections, cost estimates, and program planning documents. When this type of information is available to one contractor and not all interested contractors, some of the following problems could develop:

1. The Government's negotiating position is undermined. (Imagine going to a car dealer if they knew in advance how much you planned to pay for the car, and that you had to have this car today to keep your job.)
2. A "losing" contractor could protest an award because the winning contractor had an unfair advantage. This type of protest is very serious and could cause many problems to include:
 - (a) A delay in the award, pending protest resolution.
 - (b) Protests are expensive in time, processing costs, and legal expenses. If the company successfully protests, the government may be required to pay both the company's legal cost and the cost of developing their proposal. In addition the governments process may have been determined so compromised that a new solicitation is required that will address the protesters concerns. This can be an expensive and time-consuming process as well as delay support to the soldier. Not an outcome any of us wish for!

(c) In the case of a commercial activity under commercial activity review, the in-house work force could be disadvantaged or unfairly displaced.

VII. SECURITY

A. Avoid letting contractors have information that could have a negative impact on any future contracts. Some suggestions to consider:

1. Use common sense; treat budget data as FOUO.
2. Ensure sensitive material is received on fax machines that are accessible only to government employees with a legitimate need for the information.
3. Locate government employee's physically together so on-going work on desktops is not easily observed. In addition, ensure that contractor employees are grouped together, rather than scattered throughout the government workforce.
4. Ensure that the office LAN distinguishes access of government and contractor employees.
5. Have contractors clearly identify themselves as such, i.e. a photo ID badge with employee and company name.
6. Instruct government employees on reporting any inappropriate actions of contractor personnel such as data access violations or rummaging through a government employees desk, trashcan, or files (hard copy or electronic).

VIII. IDENTIFICATION OF CONTRACT EMPLOYEES

A. Ensure that the following requirements, as appropriate, are included in the Statement of Work (SOW) or Statement of Objectives (SOO) of any contract in which contractor personnel will attend meetings, use Government telephones and e-mail, or participate in other activities where the contractor's status is not obvious.

Identification of Contractor Employees

1. The contractor shall provide each employee with an identification (ID) badge made of nonmetallic material, easily readable and including employee's name, contractor's name, functional area of assignment, and recent color photograph of the employee.

2. Display of ID Badges: Contractor personnel shall wear the ID badge at all times when performing work under this contract at a Government site, including while attending Government meetings and conferences that may take place outside the

Government facility. Unless otherwise specified in the contract, each contractor employee shall wear the ID badge in a conspicuous place on the front of exterior clothing and above the waist except when safety or health reasons prohibit such placement.

3. Answering Telephones: Contractor personnel shall identify themselves as a contractor employee when answering Government telephones.

4. Utilizing Electronic Mail: When prime contractor or subcontractor personnel send e-mail messages as a part of contract performance (or otherwise relating to contract matters), each sender shall include his/her name (both first and last names), [E-mail address and the name of the individual's employer].

B. The contracting officer or designee shall ensure that accounts established in Government E-mail systems for prime contractor or subcontractor personnel shall identify individuals as contractor personnel in the "address book" display and on individuals' e-mail. Detailed "properties" for the account shall include the name of the individual's employer and the name of the customer for the contract. The customer's information assurance security officer that established the account shall be notified immediately when a contractor employee is no longer performing duties that require an account in the government E-mail system.

IX. ETHICAL CONSIDERATIONS

A. All Army employees shall be familiar with the Joint Ethics Regulation, DOD 5500.7-R. Briefly stated, a government employee has a responsibility to uphold the public's trust in the United States Government. Unlike private industry, a government employee must ensure that their actions are "fair" to all parties of the process. Understanding the public perceptions of "fairness" is the guiding principal on how a government employee deals with contractors.

B. Procurement officials are a special category of government employee, for instance, the contracting officer, who has a substantial decision making role in the procurement process. There are specific statutes and regulations that, among other things, place restrictions on the future employment of procurement officials, and require them to provide annual financial disclosure statements. Most government employees are not procurement officials, but if you think you or one of your employees could fall into this category, check with your SJA Ethics Advisor.

C. Procurement officials are required to attend an annual ethics briefing from their organization's designated Ethics Advisor.

D. Avoid compromising your objectivity when asked for recommendations on contractor employees. As a government official, you can provide the contractor with the names of individuals you know to be competent and qualified, but you **cannot tell** a contractor they **should/must hire** a particular individual nor can you design the work

requirements around a single individual. Be aware that the contractor may misinterpret your "suggestion" as a mandate. The contractor is solely responsible for their employees.

E. **DO NOT threaten the contractor with option nonrenewal.** The decision to not renew an option is a business decision based on all available factors and must be made in conjunction with the Contracting Officer and with the advice of the local legal advisor.

F. **DO NOT** accept gifts from a contractor or their employees. Accepting a gift from contractors is prohibited except for:

- Modest items of food and refreshment.
- The gift does not exceed \$20 value per occasion.
- Total gifts cannot exceed \$50 per source, per year.

G. As a government official you and your employee's actions should be able to stand this simple test: "How would this look on the evening news?" If you are debating a contractor related issue that could pose an ethical question, call your SJA Ethics Advisor. Your installation DOC is also your acquisition advisor. These staffs are available to provide assistance on matters involving a variety of contracting issues.

H. Government and contractor are on different sides of the bargaining table with different loyalties. We must assure that, in pursuit of meeting mission requirements, we do not lose sight of the fact that contractors must be allowed to retain responsibility for managing his contract responsibilities. Does this mean that we cannot cooperate or work together efficiently? Does this mean that we cannot be nice and polite to one another or be friends on an individual basis? No. All it means is that we have to be aware of the appropriate time to say to a contractor employee the unpleasant statement "I have no authority to resolve your problem. Go to your supervisor." It also means that we should not be reaching out to the contractor to pay his employees to do things that are not contract/mission related such as picnics, POSH or employee qualification training.

X. CONCLUSION

A. It is important to remember that, although contractor that work on site interact with us on a day to day basis much like our fellow civilian and military members, they are not government employees and do not have the same rights to access internal government information. The most important step you can take to avoid trouble is to use common sense and, secondly, seek counsel if something feels odd to you. In other words—listen to your gut! If you have any questions regarding interface with contractors in the workplace, please contact your local SJA for assistance.

Appendix A

Consultant Non-Disclosure Agreement & Certification

This Agreement and Consultant Certification is made between US Army Contracting Agency, (“ACA”), and the individual Consultant and company listed herein. The Consultant has been engaged to perform certain consulting services for [insert location and office], and in connection therewith will be given access to certain confidential and proprietary information and Acquisition related information.

1. Consultant Certification:

Consultant acknowledges that he/she will participate as a consultant at an organization or activity that conducts or is involved with Acquisition related activities. Some of Consultant’s duties will expose him/her to acquisition information which he/she cannot release to others nor can he/she use for the financial benefit of him/herself or others. Consultant understands that the release of proprietary and source selection information is governed by AR 340-17 (Release of Information and Records from Army Files), DoD 5500-7 (Standards of Conduct for Department of the Army Personnel), 5 CFR 2635 et seq. and provisions of FAR 3.104. Consultant certifies that he/she will not knowingly disclose any contractor bid or proposal or source selection information directly or indirectly to any person other than a person authorized by the Head of the Contracting Agency (HCA) or the Procuring Contracting Officer (PCO) to receive such information. Consultant understands that unauthorized disclosure of such information may subject him/her and his/her company or organization to substantial administrative, civil and criminal penalties, including fines, imprisonment, and loss of employment under the Procurement Integrity Law or other applicable laws and regulations.

Consultant realizes that his/her actions in connection with consulting with this agency are subject to intense scrutiny and will conduct his/herself in a way that will not adversely affect the confidence of the public in the acquisition process.

2. Proprietary Information

Consultant acknowledges the ACA’s “confidential information” includes, without limitation, information relating to the ACA’s research, development, products, trade secrets, know-how, contingency plans, budgeting, customers, finances and personnel, and procurement information or any other related information without regard for whether such information would otherwise be deemed secret or routine. The ACA’s confidential information, (excepting Procurement Sensitive Information), does not include any information that (i) Consultant knew before the ACA disclosed it to the Consultant; (ii) has become publicly known through no wrongful act of Consultant; or (iii) the Consultant developed independently, as evidenced by appropriate documentation.

All the ACA confidential information remains the property of the ACA and no license or other rights in the ACA confidential information is granted hereby. All

information is provided "AS IS" and without any warranty, expressed, implied or otherwise, regarding its accuracy or usability. Further, the Consultant agrees to return all the ACA's confidential information, including but not limited to all computer programs, documentation, notes, plans, briefings, MTOE(s), TOE(s), budgets and copies thereof, to the ACA on the ACA's request.

3. Non-Disclosure

a. Consultant shall disclose or give access to confidential or Proprietary Information only to such Consultant's employees, agents or contractors ("Consultant Personnel") having a need-to-know in connection with Consultant's engagement and for use in connection therewith. Consultant will advise Consultant Personnel having access to Proprietary Information of the confidential and proprietary nature thereof. The Consultant is expressly restricted from Disclosing Procurement Sensitive Information except in accordance with federal law, Title 41 U.S.C. § 423(a).

b. Procurement Sensitive Information. The types of information considered Procurement Sensitive or Source Selection Information include Contractor Bid or Proposal Information and Source Selection Information generated by the agency in its evaluation or assessment of the bid or proposal.

c. Contractor Bid or Proposal Information as defined by 41 U.S.C. § 423(f)(1) includes any of the following:

- Cost or pricing data;
- Indirect costs or labor rates;
- Proprietary information marked in accordance with applicable law or regulation; and
- Information marked by the contractor as such in accordance with applicable law or regulation.

d. Source Selection Information as defined by 41 U.S.C. § 423(f)(2) includes any of the following:

- Bid prices before bid opening;
- Proposed costs or prices in negotiated procurement;
- Source selection plans;
- Technical evaluation plans;
- Technical evaluations of proposals;
- Cost or price evaluations of proposals;
- Competitive range determinations;
- Rankings of bids, proposals, or competitors;
- Reports and evaluations of source selection panels, boards, or advisory councils; and
- Other information marked as source selection information if release would jeopardize the integrity of the competition.

4. Copies

Any copies or reproductions of the Proprietary Information shall bear the copyright or proprietary notices contained in the original.

5. Termination

Consultant shall, upon completion of the tasks assigned to Consultant, upon termination of Consultant's engagement with respect to the ACA, or upon demand, whichever is earliest, return any and all confidential and Proprietary Information (including any copies or reproductions thereof) in its possession or control.

6. Unauthorized Use

Consultant shall promptly advise the ACA in writing if it learns of any unauthorized use or disclosure of confidential or Proprietary Information by any Consultant Personnel or former Consultant Personnel.

7. Work Product

Consultant shall have no proprietary interest in the work product developed by consultant during the course of its engagement and expressly assigns all rights to copyrights, patents, trade secrets or other proprietary rights to the ACA.

8. Indemnification

Consultant, at its own expense, shall defend, indemnify and hold harmless the ACA, its licensees, employees and agents, from any claim, demand, cause of action, debt or liability (including attorneys' fees) to the extent it is based on a claim that Consultant Personnel in the course of their engagement to the ACA infringed or violated the patent, copyright, license or other proprietary right of a third party, provided Consultant is notified promptly of such claim.

9. Injunctive Relief

Consultant acknowledges that the use or disclosure of the confidential or Proprietary Information in a manner inconsistent with this agreement will cause the ACA irreparable damage, and that the ACA shall have the right to equitable and injunctive relief to prevent the unauthorized use or disclosure, and to such damages as are occasioned by such unauthorized use or disclosure.

10. Governing Law

This agreement shall be governed by Federal Law and the laws of the District of Columbia.

US Army Contracting Agency

By: _____ (DATE) _____
----- Officials name and title -----

Consultant (Name of Contractor Company)

By: _____ (DATE) _____
-- Name --, President/CEO

Consultant's Employee (Contractor Company)

BY: _____ (DATE) _____
--- Employee name and position ---

CRIMINAL PENALTIES.

Violating the prohibition on disclosing or obtaining procurement information may result in confinement for up to five years and a fine if done in exchange for something of value, or to obtain or give a competitive advantage.

CIVIL PENALTIES.

- a. The Attorney General may take civil action for wrongfully disclosing or obtaining procurement information, failing to report employment contacts, or accepting prohibited employment.**
- b. Civil penalty is up to \$50,000 (individuals) and up to \$500,000 (organizations) plus twice the amount of compensation received or offered.**